

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2021-349-E

In the Matter of:)

Joint Petition of Duke Energy Carolinas, LLC)
 and Duke Energy Progress, LLC to Request)
 the Commission to Hold a Joint Hearing with)
 the North Carolina Utilities Commission to)
 Develop Carbon Plan)

MOTION TO RECUSE

Pursuant to S.C. Code Ann. Regs. 103-829, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, the “Companies”), by and through the undersigned counsel, submit to the Public Service Commission of South Carolina (the “Commission”) their Motion to Recuse Commissioner Thomas J. Ervin because of his actions and statements on the record during the Commission’s Special Business Meeting conducted on November 18, 2021. It gives the Companies no pleasure to make this motion. After reviewing the comments during the special business meeting, however, the Companies are constrained to file this motion to preserve the integrity of these related matters coming before the Commission for a decision. At a minimum, due process and applicable ethical canons require the Commission to make decisions based on the facts and the law—following the parties’ opportunity to create a formal record—not to prejudge the issues before any party has the opportunity to be heard. For the reasons that follow, Commissioner Ervin should be disqualified from participating in or voting on any matters related to this docket.

I. BACKGROUND

On November 9, 2021, the Companies filed a Joint Petition requesting that the Commission exercise its authority granted under S.C. Code Ann. § 58-27-170 to hold a joint proceeding with

the North Carolina Utilities Commission (“NCUC”) related to the Carbon Plan required by N.C. Gen. Stat. §§ 62-2, 62-30, Part I of Session Law 2021-165. Contemporaneously, the Companies filed a companion Joint Petition with the NCUC. Also included in the Companies’ requested relief was a proposed procedural schedule for the docket.

The Companies filed these petitions because they believe both North Carolina and South Carolina stakeholders should have a seat at the table as decisions are made regarding the resources needed to meet the energy needs of the Companies’ customers for the next decade. After all, the Companies’ joint system serves around 4 million customers across 56,000 square miles of the Carolinas. And for decades, retail and wholesale customers in both states have shared allocated system costs and benefits. Through these petitions, the Companies are asking the two state regulatory authorities that regulate DEC’s and DEP’s rates and service to undertake a coordinated joint proceeding in furtherance of the Companies’ continuing energy transition to address operational challenges, ensure fuel security, and reduce carbon emissions in the Carolinas, while maintaining reliability and affordable rates for customers.

Recognizing the importance and complexity of the issues, on November 10, 2021, the Companies filed a notice of request for an allowable ex parte briefing to explain the Joint Petition and the reasons for the request.¹ That same day, the Office of Regulatory Staff (ORS) filed a letter expressing concerns about the Companies’ proposed timeline and asking the Commission to allow for additional time. Further, Google, LLC filed a letter asking the Commission to deny the Companies’ request for an allowable ex parte briefing. The Commission then scheduled and held a special business meeting on November 18, 2021 to address these matters.

¹ These briefings are expressly permitted under the law, *see* S.C. Code Ann. § 58-3-260(C)(6), and have been a fixture on the Commission’s docket for years.

During the special business meeting, Vice Chair Florence P. Belser moved that the Commission adopt a proposed procedural schedule. Chairman Justin T. Williams moved to deny Google’s motion to deny the Companies’ request for an allowable ex parte briefing. Although the merits of the Joint Petition were not before the Commission at that time, during consideration of the motions by Vice Chair Belser and Chairman Williams related to the procedural schedule and ex parte briefing, Commissioner Ervin repeatedly expressed his view of how the Commission should rule on the Joint Petition. In doing so, Commissioner Ervin indicated that not only was he opposed to holding a joint proceeding, but he was also opposed to any coordination on what—in his view—was solely a North Carolina issue. What is more, he tried to convince other Commissioners to dismiss the Joint Petition. No parties were present at the special business meeting.

This matter therefore comes before the Commission on the Companies’ motion for Commissioner Ervin to be recused from participating in this docket to ensure they receive a fair proceeding commensurate with their due process rights.

II. BASIS FOR RECUSAL

The Commission’s stated mission is “[t]o serve the public of South Carolina by providing open and effective regulation and adjudication of the state’s public utilities, through consistent administration of the law and regulatory process.” *Mission Statement*, PUB SERV. COMM’N OF S.C. (last visited Jan. 7, 2022), <https://psc.sc.gov/about-us-0/mission-statement>. In fulfilling that mission, “[t]he commissioners . . . are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules.” S.C. Code Ann. § 58-3-30(B).

Under the Code of Judicial Conduct, each Commissioner must establish, maintain, and enforce “high standards of conduct” to ensure that “integrity and independence” are preserved. Canon 1, Rule 501, SCACR. Indeed, Commissioners must “act at all times in a manner that

promotes public confidence in the integrity and impartiality of the” Commission. Canon 2(A), Rule 501, SCACR. When a Commissioner’s impartiality may reasonably be questioned, that Commissioner “shall disqualify himself.” Canon 3(E), Rule 501, SCACR.

Also relevant here, a Commissioner “shall not, while a proceeding is pending or impending . . . , make any public comment that might reasonably be expected to affect its outcome or impair its fairness.” Canon 3(B)(9), Rule 501, SCACR. To be sure, Commissioners must perform their duties “without bias or prejudice.” Canon 3(B)(5), Rule 501, SCACR. And when a party shows some evidence of bias or prejudice, the Commissioner in question shall be disqualified. *E.g.*, *Patel v Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004); *Roche v. Young Bros., Inc. of Florence*, 332 S.C. 75, 84–85, 504 S.E.2d 311, 316 (1998). In light of these precepts, Commissioner Ervin should be recused because he violated the Code of Judicial Conduct and South Carolina law by and through his statements on the record during a special business meeting—at which no party was present—regarding his predetermined vote on not only whether to hold a joint hearing with the NCUC, but also the ultimate outcome of a joint proceeding.

During the meeting, for example, Commissioner Ervin said that “ratepayers in South Carolina shouldn’t have to pay for any gas peaker plants that they want to build in North Carolina.” *Special Business Meeting*, PUB. SERV. COMM’N OF S.C. at 26:49–56 (Nov. 18, 2021), <https://www.scetv.org/live/public-service-commission>. When Vice Chair Belser clarified her motion addressed the procedural schedule for comments, Commissioner Ervin pushed back: “Why should we waste the valuable time of the parties asking for comments when we can go ahead and make a decision now? We don’t have anything to do with North Carolina law.” *Id.* at 33:16–25.²

² Notably, South Carolina law expressly allows for joint hearings. *See* S.C. Code Ann. § 58-27-170 (“The commission may hold joint hearings and issue joint or concurrent orders in conjunction or concurrence with any official board or commission of any state or of the United States.”).

But the merits of the Joint Petition and the Carbon Plan were not before the Commission at that time. Instead, the Commission was taking up (1) ORS's request for a procedural schedule for comments and (2) Google's motion to deny the Companies' request for an allowable ex parte briefing. As Chairman Williams aptly noted, an allowable ex parte "briefing is an educational session. It has no real bearing on the outcome of the ultimate decision." *Id.* at 36:20–27. Nevertheless, Commissioner Ervin was determined to discuss the merits of both the Joint Petition and the Carbon Plan. Regarding the Companies' request for a joint hearing with the NCUC, Commissioner Ervin stated as follows:

I don't want to do that. Because I don't think we have any jurisdiction over North Carolina utilities. The North Carolina Commission will have to interpret the new act and how it should be implemented. And furthermore, if we go up there and participate in Raleigh, it could be construed as our consent to some kind of plan without even having a hearing in South Carolina. I don't think it's fair to have our ratepayers have to pay for North Carolina's plan. It's already clear that that's perhaps where Duke is headed, and with all due respect, we've never had to do that. We saw that our supreme court in South Carolina said when the coal ash decision came down that it was not South Carolina taxpayers or ratepayers who should pay for removal of coal ash in North Carolina. And it was the fault of the utility in North Carolina. So we have clear supreme court authority for not getting tagged with North Carolina costs. And my concern is if we go up to a hearing tomorrow virtually and participate, we are tacitly conceding and admitting that we're gonna be part of the plan – we're gonna be part of the carbon plan. And I don't want to get a bill for that later because it's gonna be a big one. So I would not want to participate in that proceeding—whether it's tomorrow or whether it's next year. We have our own independent integrated resources process and that's what we should follow. We have no business getting involved in North Carolina law. That is the responsibility of the North Carolina Utilities Commission. So I'm gonna be voting for Google's motion to dismiss this petition and, I encourage my fellow Commissioners to do likewise.

Id. at 50:27–52:36.

Respectfully, this was improper. *See* Canons 1, 2(A), 3(B)(9), 3(B)(5) & 3(E), Rule 501, SCACR. Commissioner Ervin's statements are "some evidence of bias or prejudice," and recusal

is thus mandated here. *Patel*, 359 S.C. at 524, 599 S.E.2d at 118; *Roche*, 332 S.C. at 84–85, 504 S.E.2d at 316. The Companies are entitled to a fair proceeding and an impartial Commission that has not prejudged the issues. Because Commissioner Ervin made up his mind and tried to “encourage [his] fellow Commissioners to do likewise,” he is disqualified from participating in these proceedings. Fundamental notions of due process require no less. *See* S.C. CONST. art. I, § 22. To his credit, Commissioner Ervin has recognized the need to recuse himself in prior proceedings when his impartiality was reasonably questioned. *E.g.*, Docket Nos. 2020-229-E, 2021-143-E & 2021-144-E. In those cases, Commissioner Ervin recused himself during the course of multi-day hearings for prematurely expressing his views of the case. Where, as here, he expressed those views before any party had an opportunity to be heard is all the more concerning and requires the same result.

WHEREFORE, for the foregoing reasons, the Companies have serious due process concerns regarding the remainder of this proceeding and the logical outcome and, therefore, respectfully request that:

1. Commissioner Ervin be recused from voting on or participating in any discussions on substantive or procedural matters related to this docket, including, but not limited to, whether to hold a joint proceeding with the NCUC;
2. If the Commission grants the Joint Petition to hold a joint proceeding with the NCUC, Commissioner Ervin be recused from participating in the joint proceeding or voting on whether the Carbon Plan is appropriate for use in resource planning in South Carolina;
3. Commissioner Ervin avoid any further contact with members of the Commission or its staff regarding this docket; and
4. Commissioner Ervin not attempt to influence any member of this Commission or its staff regarding this docket.

III. CONCLUSION

The Companies do not make this motion lightly. But the comments and conduct during the Commission's special business meeting lead to the inescapable conclusion that Commissioner Ervin has already prejudged the issues and reached a final decision on both the outcome of whether the Commission should participate in a joint proceeding with the NCUC, as well as the ultimate outcome of that joint proceeding, i.e., the merits of the Carbon Plan. Further, the Companies are concerned that Commissioner Ervin "encouraged" and tried to persuade other Commissioners to agree with his prejudged determinations. To ensure these proceedings are fair and comport with due process, Commissioner Ervin should be recused from any further participation in this docket and, if the Commission grants the Joint Petition to hold a joint proceeding with the NCUC, participating in the joint proceeding or voting on the merits of the Carbon Plan.

Dated this 7th day of January, 2022.

Respectfully submitted,

/s/Frank R. Ellerbe, III

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